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No. 80-2061

In the Supreme Court of the United States

October Term, 1980

RICHARD J. ROME,
Petitioner,

vs.

STATE OF KANSAS, ex rel. COMMISSION ON JUDICIAL QUALIFICATIONS,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The question presented for review is whether Petitioner received due process of law in the proceeding which culminated in his removal from office.

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OPINION BELOW

The opinion of the Kansas Supreme Court accepting a recommendation of the Kansas Commission on Judicial Qualifications for removal of Petitioner from office is reported as *State of Kansas, ex rel. Commission on Judicial Qualifications v. Richard J. Rome,* 229 Kan. 195, 623 P.2d 1307. The full text of the opinion is set out in Appendix A of the Petition for Certiorari. An Order denying motion for rehearing is set out as Appendix B in the Petition for Certiorari.

JURISDICTION

The jurisdictional statement is contained in the Petition for Certiorari, pp. 1-2.

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

United States Constitution, Amendment XIV

§ 1. . . . "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person or life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Kansas Constitution, Article III

§ 1. "The Supreme Court shall have general administrative authority over all courts in this state . . . ."

§ 15. "Other judges shall be subject to retirement for incapacity and to discipline the suspension and removal for cause by the Supreme Court after appropriate hearing."

Rules of the Supreme Court of the State of Kansas relating to Judicial Conduct effective January 8, 1979, as follows:

Canon 1

"A Judge should uphold the integrity and independence of the judiciary."

Canon 2

"A Judge should avoid impropriety and the appearance of impropriety in all his activities."

Canon 3A. (3)

"A Judge should perform the duties of his office impartially and diligently.

"A. Adjudicative Responsibilities.

"(3) A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity, and should require similar conduct of lawyers, and of his staff, court officials, and others subject to his direction and control."

Canon 3A. (6)

"A Judge should perform the duties of his office impartially and diligently.

"A. Adjudicative Responsibilities.

"(6) A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to his direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the Court."

Rule 609

"INVESTIGATION. An investigation by or under the direction of the examiner shall be made before formal proceedings are instituted. Such investigation may be made on the commission's own motion, and shall be made when the commission has received a complaint indicating that a judge has failed to comply with the Code of Judicial Conduct or has disability that seriously

interferes with the performance of judicial duties. The judge shall be contacted during the investigation, and shall be advised informally that an investigation is being made, and the subject thereof. The judge may present information to the examiner."

Rule 611(b)

"FORMAL PROCEEDINGS. (1) After the investigation has been completed, if the commission concludes formal proceedings should be instituted, or after a judge refuses to accept a cease and desist order, the commission shall forthwith issue a written notice to the judge advising him or her of the institution of formal proceedings to inquire into the charges against the judge. Such proceeding shall be entitled:

'BEFORE THE COMMISSION ON JUDICIAL QUALIFICATIONS

Inquiry Concerning a Judge,

No. .....'

"(2) The notice shall specify in ordinary and concise language the charges against the judge and the alleged facts upon which such charges are based, and shall advise the judge of his or her right to file a written answer to the charges within twenty days after service of the notice.

"(3) Unless service is waived in writing, the judge or the judge's guardian shall be sent a copy of the notice."

Rule 612

"ANSWER. Within twenty days after notice of formal proceedings, the judge may file an answer with the commission."

Rule 614

"HEARING. (a) At the time and place set for hearing the commission shall proceed with the hearing whether or not the judge has filed an answer or appears at the hearing. The examiner shall present the case in support of the charges in the notice of formal proceedings.

"(b) The failure of the judge to answer or appear at the hearing shall not be taken as evidence of the truth of the facts alleged to constitute grounds for discipline, suspension, removal or compulsory retirement. The failure of the judge to submit to a medical examination requested by the commission may be considered unless it appears that the failure was due to circumstances beyond the judge's control.

"(c) The proceedings at the hearing shall be recorded verbatim.

"(d) At the hearing before the commission not less than three members shall be present when evidence is introduced."

Rule 617

"Amendments to Notice or Answer. The commission at any time prior to its determination may allow or require amendments to the notice of formal proceedings and may allow amendments to the notice of formal proceedings and may allow amendments to the answer. The notice may be amended to conform to the proof or to set forth additional facts, whether occurring before or after the commencement of the hearing. In case such amendment is made the judge shall be given reasonable time both to answer the

amendment and to prepare and present his defense against the matters charged thereby."

Rule 620(a)

"COMMISSION DISPOSITION OR RECOMMENDATION. (a) If the commission finds the charges proven it shall either (1) admonish the judge, or (2) it shall recommend to the Supreme Court the discipline or compulsory retirement of the judge. 'Discipline' means public censure, suspension, or removal. The affirmative vote of five members of the commission is required for a finding that the charges have been proven and for a recommendation of discipline or compulsory retirement."

STATEMENT OF FACTS

The Constitution of the State of Kansas relating to the judiciary was amended following a 1972 constitutional amendment to specifically authorize the Supreme Court of the State of Kansas to administer the discipline of the judiciary of the state. See Kansas Constitution, Article III, Section 1, Section 15. Canons of Judicial Conduct were adopted by the Court to implement the Constitutional authority effective January 1, 1974. Those Canons were consistent with the Canons of Judicial Conduct adopted by the House of Delegates of the American Bar Association in November, 1972. At the same time that it adopted the Canons of Judicial Conduct, the Kansas Supreme Court in Rules 602 through 629 of its Rules Relating to Judicial Conduct organized the Kansas Commission on Judicial Qualifications, clothed it with general investigative authority and empowered it to conduct hearings and make recommendations to the Court concerning discipline, and provided the Commission with necessary powers to im-

plement its mandate. In Rule 609 of the Kansas Supreme Court Rules, it is provided that the investigation which may be commenced after a complaint must be made before formal proceedings are instituted and made with the provision that the Respondent/Judicial officer be contacted during the investigation, be advised that the investigation is pending and be given an opportunity to present information to the person making the investigation. The Rules then provide in Rule 611(b) that after an investigation has been completed, a formal proceeding, which is the equivalent of an adversary proceeding, may be instituted by the Commission and as a part of that commencement of formal proceeding, the Respondent/Judicial officer shall be advised of his or her right to file a written answer to the charges within a certain time period. Rule 612 then provides for the filing of such an answer with the Commission; Rule 613 provides for the hearing; Rule 614 provides for the manner of setting the time and place of the hearing; Rule 615 specifies that the rules of evidence applicable to civil cases apply to the hearings; Rule 616 suggests the procedural rights of the judge to defend against the charges by the introduction of evidence, to be represented by counsel and to examine witnesses, to have the right to issue subpoenaes for the attendance of witnesses or the production of documents; and Rule 618 provides for extensions of time to answer and for the commencement of a hearing. Rule 605 provides the procedure for compelling the attendance of witnesses and the production of documents as well as for conducting certain discovery matters. Rule 617 provides that the Commission at any time prior to its determination may allow or require amendments to the notice of formal proceedings and may allow amendments to the answer to conform to the proof or to set forth additional facts whether occurring before or after the commencement of the hearing. It is

further provided that in the event the notice of formal proceeding is amended that the Respondent/Judicial officer have a reasonable time both to answer the amendment and prepare and present its defense against the matters charged. The Commission is then given the authority to make recommendations if it finds the charges proven including the recommendation of removal from office.

Consistent with those procedural rules, on March 19, 1979, after receiving a complaint, the notice of preliminary investigation required by Rule 609 was forwarded to Respondent. The allegations set forth in that notice later constituted the basis of the notice of formal proceedings, the formal adversary proceeding filed pursuant to Rule 611(b) on June 7, 1979. Petitioner replied to the notice of preliminary investigation that "I refuse to furnish you, the Commission you represent, or any representative thereof any information concerning the above; all on the ground that it might intend to incriminate me," by letter of March 22, 1979. The notice of formal proceeding was subsequently filed on June 7, 1979 in Docket #173; an answer filed on July 24, 1979; a pre-hearing conference as authorized by Rule 605(f) was held on August 20, 1979. After consulting schedules of the availability of counsel and the Commission, an Order setting the hearing on the notice of formal proceeding was filed on September 21, 1979, setting the hearing for November 5 and 6, 1979. That hearing was actually held on November 5 and 6, 1979. At the outset of that hearing, the examiner[1] requested that the allegations of one of the charges be dismissed. The Commission dismissed those charges. The Commission's counsel then introduced evidence in sup-

1. Rule 604(c) provides for counsel designated by the Commission, who is the "examiner," whose function it is, inter alia, to present evidence in support of the allegations.

port of the remaining two allegations. The evidence consisted of the testimony of two attorneys of the Reno County Bar Association and the Administrative Judge of the District Court of Reno County, Kansas.

In general, the evidence introduced in support of the allegations of judicial misconduct tended to prove that the petitioner had allowed his views on a political issue to influence his disposition of judicial proceedings, and that he had made the equivalent of a threat against a bondsman (See Appendix A, Petition for Certiorari, hereinafter denominated Appendix, pp. A.6-A.9, A.21). Petitioner then introduced evidence denying the factual allegations of the charge as well as evidence supporting his own character and tending to impeach the credibility of one of the witnesses introduced by the examiner.

Petitioner's complaint as set forth in the Petition for Writ of Certiorari relates to amendments that were made in the notice of formal proceeding as a result of the November 5 and 6 hearing in Hutchinson, Kansas. Relevant to his argument is the chronology and reason for what occurred relating to the introduction of evidence at that hearing. The amendments to the notice of formal proceeding which were subsequently filed pursuant to Rule 617 of the Rules of the Supreme Court Relating to Judicial Conduct on December 10, 1979, were predicated upon evidence introduced as rebuttal evidence in the November 5 and 6 hearing. The evidence that constituted the basis of the amended notice was presented in the rebuttal testimony caused to be introduced by petitioner's assertions in petitioner's testimony that he did not allow political decisions to influence his judicial decisions and his introduction of the issue of character into the proceeding (See Appendix A, pp. A.9, A.13).

Petitioner's evidence alleged that his actions as a judicial officer concerning the disposition of cases and his treatment of persons in a judicial capacity did not change in anyway because of his reaction to results of a political issue in Reno County, Kansas, in September, 1978. That issue involved the method of selection of judges of the district court. Petitioner had presided, as president, at a September 28, 1978, meeting of the Reno County Bar Association when a resolution was adopted putting the Bar Association on record as supporting the non-partisan selection of judges as opposed to the election of judges by the public (the issue was to be presented on the ballot at the general election of November, 1978). Petitioner had testified in the hearings that one of the reasons why he was opposed to the non-partisan selection of judges was that would detrimentally affect his opportunity to advance to a position as a District Court Judge from his position as an Associate District Court Judge (Appendix A, A.7). Therefore, at the conclusion of Petitioner's defense, rebuttal and evidence was introduced attempting to refute or rebut the conclusions asserted by Petitioner that he did not allow the political issue of non-partisan selection of judges, and the position taken thereupon by the Bar Association, affect his decisions and his treatments of persons who appeared before him while he was performing his judicial duties. Six such witnesses were called to testify in rebuttal. They included witnesses Joseph O'Sullivan, the County Attorney, Attorney Dan Forker, Attorney Steven Childs, and Attorney D. Stewart Oswalt (Appendix A, A.11). Prior to the November 5 and 6, 1979, hearing, a statement that had been taken by the Examiner from the witness, Joseph O'Sullivan because O'Sullivan had been listed as one of Petitioner's witnesses, was supplied to counsel for Petitioner. Prior to November 5 and 6 no statements had been taken of the other three attonreys. Counsel for Petitioner

had also been provided a statement taken from James Fountain, Reno County Sheriff, prior to the November 5 and 6, 1979, hearing.

It was the testimony in rebuttal of the witnesses O'Sullivan, Forker, Childs, and Oswalt which formed the basis for the amended notice of formal proceedings alleging Count III therein that Petitioner had allowed the Bar Association's position on a political issue to influence his judgments and actions while performing judicial duties, that partially forms the basis of Petitioner's allegation of constitutional error. Count IV of the amended petition related to a memorandum opinion Petitioner had filed in a criminal case (Appendix A, A.13-A.18). The Commission determined that the nature of the memorandum opinion, not its effect, was an attempt to criticize a fellow judge, the County Attorney, and the manner and method by which the memorandum opinion was issued constituted violations of the Canons of Judicial Conduct (Appendix A, A.17-A.18, A.21). The memorandum opinion was mentioned in the statement taken from the witness O'Sullivan who testified in rebuttal. The memorandum opinion was not part of the examiner's case when the witness O'Sullivan testified. Petitioner personally cross-examined the witness O'Sullivan and during that cross-examination raised the issue of the memorandum opinion. The examiner objected to the introduction of the memorandum opinion in evidence and to cross-examination of the witness O'Sullivan concerning its content because the same was absolutely irrelevant to the testimony that O'Sullivan had given. That objection was overruled. The memorandum opinion in question had been written on September 12, 1980 (Appendix A, A.15), approximately one and one-half months before the scheduled hearing on the notice of formal proceedings and was not related to the allegations contained in the notice of formal proceeding which

concerned events occurring in the fall of 1979. The memorandum opinion which gave grounds for Count IV of the amended notice of formal proceeding was made part of the hearing on November 5 and 6 by Petitioner over the objection of the examiner. Therefore, pursuant to the provisions of Rule 617 which specifically authorizes amendments to the notice of formal proceeding, an amended notice of formal proceeding was filed on December 10, 1979. The amended notice authorized Petitioner to file a response or answer. Subsequently, a second hearing at which evidence upon the amended notice was to be presented was set for April 28 and 29, 1980. At that hearing, Petitioner was entitled to and did introduce any and all evidence he wished, that was legally admissible, concerning the allegations in Counts III and IV of the amended notice.

During the interval from November 5 and 6, 1979, to April 28 and 29, 1980, an additional investigation was made concerning an additional charge of improper conduct against Petitioner that was not in any way a part of the November 5 and 6, 1979, hearing. In general, that assertion was that the Petitioner had challenged the Sheriff of Reno County, Kansas, to a fight in the Reno County Courthouse. The Rule 609 Notice of Preliminary Investigation, was mailed to Petitioner, dated December 4, 1979. By a letter dated January 29, 1980, Petitioner replied and denied the factual basis of the accusations. Subsequently, a notice of formal proceedings on Count I in Docket #197 was filed on March 17, 1980. At Petitioner's request, the two cases were consolidated for hearing and evidence introduced on Counts III and IV of Docket #173 and Count I of Docket #197 on April 28 and 29, 1980. Following four days' worth of hearings, the Commission on Judicial Qualifications found the allegations of Counts I, III, IV in Docket #173 and Count I in Docket #197 had been

proven by clear and convincing evidence, and that the allegations of Count II of Docket #173 had not been proven by clear and convincing evidence and recommended the discipline of removal from office. The Supreme Court on review accepted the recommendation. This Petition followed.

ARGUMENT AND AUTHORITIES

I. Petitioner Was Not Denied Due Process of Law in the Judiciary Disciplinary Proceeding Which Culminated in His Removal From Office by Order of the Supreme Court of the State of Kansas.

Petitioner's complaint is that he was denied due process of law. He relies solely in support of that allegation upon this Court's decision in *In re Ruffalo*, 390 U.S. 544, 88 S.Ct. 1222, 20 L.ed. 2d 117 (1968). Petitioner was not denied due process of law, procedurally or otherwise. A detailed procedure protecting any respondent's rights had been adopted by the Kansas Supreme Court in disciplinary proceedings and had been enforced during the disciplinary proceeding against Petitioner. The sequence of events in Petitioner's case are significantly different than those in the *Ruffalo* case, thus distinguishing that case.

The basis of due process is notice and an opportunity to be heard.

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Han-*

over Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.ed. 865 (1950).

Fair notice of the charge is included. *In re Ruffalo, supra,* at U.S.

> "The fundamental requisite of due process is *notice, and an opportunity for a full and complete hearing.*" *Carrigg v. Anderson,* 167 Kan. 238, 246, 205 P.2d 1004 (1949).

In Petitioner's case, it was obvious that he was provided with all of the procedural tools to be apprised of what was going on in the proceeding against him and given a full and complete opportunity to respond or present anything in the way of defense that he wished, as long as that attempt complied with the rules of procedure and evidence.

Concerning Petitioner, he was adequately protected with regard to notice and opportunity to be heard. He was first notified of the original allegations on March 19, 1979, and then originally notified of the allegations of Docket #197 on December 4, 1979. Subsequent to the preliminary notice of the first charges, he responded by saying that he had nothing to say. He was then notified formally on June 7, 1979, in the original notice of formal proceeding. He was given an opportunity to present anything that he wished as long as the proposed evidence was legally admissible, at a two-day hearing on November 5 and 6, 1979. Based on some evidence that was presented in rebuttal at that hearing, and on a written document prepared and filed by Petitioner, the knowledge of which became known a month to a month and a half before the November 5 and 6 hearing, an amended notice of formal proceeding notified Petitioner of additional charges. Those charges were not based on his testimony. He was

not trapped into incriminating himself, so to speak. Following the filing of the amended notice of formal proceeding on December 10, 1979, Petitioner was again given the opportunity to present any defense that he had in a two-day hearing on April 28 and 29, 1980. That he did.

Concerning the due process requirement of an opportunity to be heard, there were, to start with, four days' worth of oral testimony taken. Pursuant to Rules of the Supreme Court Relating to Judicial Conduct, hearings were set concerning the allegations of misconduct (Rule 613); Petitioner had available various discovery tools prior to the actual hearing (Rule 605); Petitioner had the opportunity to present evidence in his defense (Rule 616); Petitioner had the right to be represented by counsel as he was (Rule 616); and Petitioner had the right to subpoena witnesses or written documents in his defense, which he did (Rule 616).

Rule 617 of the Rules of the Kansas Supreme Court Relating to Judicial Conduct provides that, as do comparable procedural regulations in the Kansas Code of Civil Procedure (See K.S.A. 60-215), the Federal Code of Civil Procedure (See Federal Rule 15), and presumably the codes of procedure of most jurisdictions, that an amendment to the proceeding may be made to consider evidence that is presented at a hearing among other things. The amended notice of the two counts, III and IV, of Docket #173 did not concern the oral testimony of Petitioner in the defense of the original charge against him. It consisted of the testimony of four attorneys in rebuttal, and of a document which had been filed in a Court case in Reno County, Kansas, on September 12, 1979.

In re Ruffalo does not require the conclusion that Petitioner was deprived of due process. First, it is distin-

quishable on its facts. *In re Ruffalo*, the conviction which resulted in disbarment was based solely on testimony of the Respondent/Attorney made in defense of the original charge. See 390 U.S., at 549. In this case that is not so. The amended notice concerned Counts III and IV of Docket #173. Count III was predicated upon the testimony of four attorneys, not Petitioner's testimony (Appendix A, A.11). Count IV was predicated upon a memorandum opinion that had been written and filed on September 16, 1979, by Petitioner in the criminal case in Reno County, Kansas (Appendix A, A.15-A.17). If that opinion constituted the basis of conduct contrary to the Canons of Judicial Conduct in the State of Kansas, its contents and existence was determined prior to the hearing on November 5 and 6, 1979, and testimony by Petitioner was not in any way related to it. That opinion had been filed one and one-half months before the November 5 and 6 hearing and a year after the original notice of formal proceeding had been filed (Appendix A, A.15).

Presumably, it would have been possible during the pendency of the original notice of formal proceeding if anything additional occurred that might form the basis of an additional charge, to secure a continuance of the original hearing to allow for the use of the procedural protections provided in the Kansas rules including the notice of preliminary investigation (which is mandatory); and the entire proceeding could have been continued to some future date when the entire investigation, including the new matters might have been completed had not additional new violations occurred. Of course, that method of conducting the proceeding could give any person who is the subject of such a proceeding a ready-made opportunity to postpone the proceeding, including the additional alleged improprieties, indefinitely. Further, if that had been done,

in view of the fact that Petitioner had complained that he wanted an early disposition of the original charges, he would then be complaining that the entire process took too long and any right that he had to a speedy resolution of the matter had been violated.

Suffice it to say that a set of procedural rules designed to protect and implement his rights to fair notice and an opportunity to be heard were and are in effect concerning judicial disciplinary hearings in the State of Kansas. They were utilized by Petitioner and in Petitioner's case and his rights to be accorded due process of law have not in anywise been violated.

One other matter concerning *In re Ruffalo, supra,* should be observed. This Court's decision in that case related principally to its supervisory authority over the constituency of the bar of the federal court. The opinion itself and a concurring opinion note that the direct proceedings emanating from the Courts in Ohio, through a Petition for a Writ of Certiorari to an Ohio Court, was denied. See 390 U.S. 545, 552. See *Ruffalo v. Mahoning County Bar Association,* 379 U.S. 931 (1964). That would indicate that as far as the ability of the State to discipline its judicial officer even if *Ruffalo* were applicable factually, no grounds to support this Petition for Writ of Certiorari exists.

CONCLUSION

It is submitted that the recommendation of the State of Kansas Commission on Judicial Qualifications was made after hearings which accorded Petitioner due process of law, and those recommendations as accepted and affirmed by the Supreme Court of the State of Kansas should stand. The Petition for Certiorari should be denied.

Respectfully submitted,

THE STATE OF KANSAS EX REL.
COMMISSION ON JUDICIAL
QUALIFICATIONS
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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari was mailed to Richard J. Rome, Attorney at Law, 216 West 2nd Street, Hutchinson, Kansas 67501, by depositing same in the United States mail, postage prepaid, on the 20th day of July, 1981.

EDWARD G. COLLISTER, JR.